

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

*Orig. Affidavit
mailing*

77-1221

To be argued by
ALVIN A. SCHALL

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 77-1221

UNITED STATES OF AMERICA,

Appellee,

—against—

FRANCIS E. KING,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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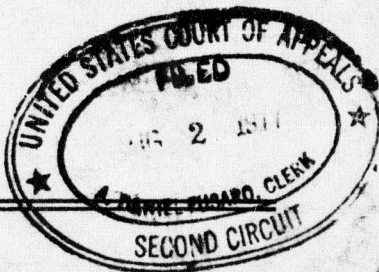




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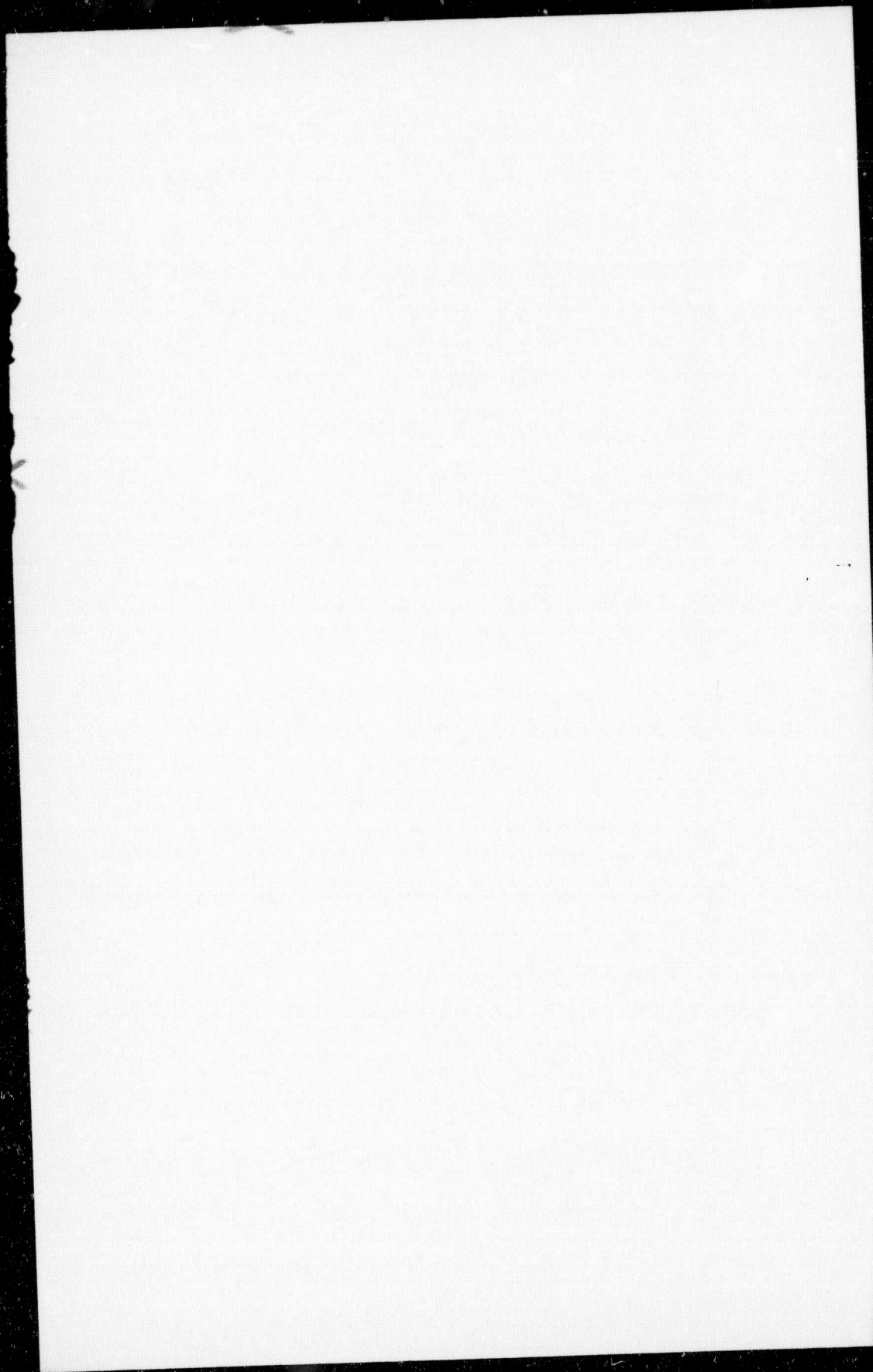
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FOR THE SECOND CIRCUIT**

Docket No. 77-1221

UNITED STATES OF AMERICA,

Appellee,

—against—

FRANCIS E. KING,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Francis E. King appeals from a judgment of the United States District Court for the Eastern District of New York (Jack B. Weinstein, *J.*) entered on April 18, 1977, convicting him, after a jury trial, of violations of the federal income tax laws.

King was tried on a six count indictment. Count One alleged that when filing his 1970 federal income tax return, he knowingly made a false statement with respect to a material matter by understating by a substantial amount his adjusted gross income for the year 1970, in violation of 26 U.S.C. § 7206(1). In Count Two of the indictment, King was accused of having knowingly and wilfully failed to file a federal income tax return for the year 1971, when he had the obligation to do so, in violation of 26 U.S.C. § 7203, while Count

Three charged that King sought to evade the payment of his 1971 federal income taxes by failing to file a return and by concealing his income, in violation of 26 U.S.C. § 7201. Similarly, in Counts Four and Five, respectively, King was charged with wilfull failure to file his 1973 federal income tax return and attempted evasion of 1973 federal income taxes by failing to file a return and by concealing income, in violation of 26 U.S.C. §§ 7203 and 7201. Finally, Count Six of the indictment alleged that in an application for an extension of the time in which to file his 1973 federal income tax return, King made a material misstatement by falsely stating that he had timely filed his federal income tax return for each of the three immediately preceding years, in violation of 26 U.S.C. § 7206(1) (A. 6-13).¹

King was found guilty on Counts One, Four, Five and Six of the indictment. Counts Two and Three were dismissed by the court after the jury found lack of venue in the Eastern District of New York. King received concurrent sentences of three years on Count One, one year on Count Four, five years on Count Five and three years on Count Six. In addition, he was fined \$5,000 on each of Counts One and Six and \$10,000 on each of Counts Four and Five, for a total fine of \$30,000. King is free on bail pending this appeal.

On appeal, King makes essentially four claims: *first*, that the admission of certain evidence against him should have been barred by the doctrine of collateral estoppel; *second*, that there was insufficient evidence to convict him on any of the counts in the indictment; *third*, that the Government failed to establish venue in the Eastern District with respect to Count One and *fourth*, that he was the victim of selective prosecution.

¹ References preceded by the letter "A" are to pages of King's appendix.

Statement of Facts

A. Introduction

The evidence showed that from 1970 through 1974 King sought to evade the payment of federal income taxes by making false statements on documents filed with the Internal Revenue Service ("IRS"), by failing to file tax returns for the years 1971 and 1973 and by attempting, throughout this period, to conceal substantial portions of his income. To make out its case, the Government used the expenditures method of proof.²

² The "cash expenditure" method of proof is a variant of the "net worth" method, which permits circumstantial proof of a defendant's taxable income in cases where the prosecution is unable directly to show specific items of such income. *United States v. Bianco*, 534 F.2d 501, 503 (2d Cir.), *cert. denied*, 429 U.S. 822 (1976). These two indirect methods of proof have been explained and distinguished by the First Circuit in *Taglianetti v. United States*, 398 F.2d 558, 562 (1968), *aff'd*, 394 U.S. 316 (1969), as follows:

"The net worth method involves the ascertaining of a taxpayer's net worth positions at the beginning and end of a tax period, and deriving that part of any increase not attributable to reported income. This method, while effective against taxpayers who channel their income into investment or durable property, is unavailable against the taxpayer who consumes his self-determined tax free dollars during the year and winds up no wealthier than before. The cash expenditure method is devised to reach such a taxpayer by establishing the amount of his purchases of goods and services which are not attributable to the resources at hand at the beginning of the year or to non-taxable receipts during the year." (footnotes omitted).

B. The Government's Case

I

During 1970, King was a narcotics detective with the New York City Police Department, earning a salary of just under \$18,300. At the beginning of the year, his assets consisted of an automobile and a house in Commack, New York, on which there was a mortgage, where he lived with his wife and three of his four children (279, 337-343, 431-437; GX. 47; GA. 1).³ On his federal income tax return for 1970, King reported adjusted gross income of \$16,863.00 (412; GX. 47; GA. 1). The evidence showed, however, that his true income was substantially in excess of that amount.

In 1970, King was assigned to the New York City Police Department's Special Investigations Unit ("SIU") (120). The SIU was a special city-wide unit comprised of four, five and six man teams of detectives. The purpose of the SIU was to investigate and develop cases against high level drug dealers (119-121).⁴

In November of 1970, King was a member of an SIU team comprised of himself, Detective Ann Crosby King, who later became his second wife, and Detectives John White, Ronald Hefferman and Jack Matarasso (122-123). During this period, the King team was conducting an

³ Numbered references are to pages of the trial transcript. Government exhibits are designated by the letters "GX", while pages of the Government's appendix are designated by the letters "GA".

⁴ The workings of the SIU were thoroughly detailed in *United States v. McClean*, 528 F.2d 1250 (2d Cir. 1976). In commenting upon the SIU, this Court stated that the evidence in *McClean* revealed "a sordid picture of police corruption, extortion and misconduct that appears to have permeated an important unit of the New York City Police Department." 528 F.2d at 1252.

investigation on the upper east side of Manhattan in the area of 116th Street. The investigation was centered on a suspect who was known to the officers simply as the "Chinaman" (123-124).

In late November of 1970, while the "Chinaman" investigation was continuing, Detective White received a call from King asking that he meet him at the Howard Johnson's Restaurant in Brentwood, New York, just off the Long Island Expressway. At the restaurant, White was met by King, and shortly thereafter the pair was joined by Detective Matarasso (125-126). King related that he had stopped the "Chinaman" and that although he had no drugs on him, the narcotics suspect had been carrying a shopping bag containing cash. King told his fellow detectives that he had seized the money and that he was now going to give them their share. Outside in the Howard Johnson's parking lot, King went to his car and brought out two paper bags. He gave one to Matarasso and the other to White. White then got in his car, left the restaurant and drove to his home a short distance away. Upon arriving home, White opened the paper bag. Inside, was \$1,000 in one dollar bills (126-128).⁵

Moreover, in addition to presenting this evidence, which established a source of income other than his reported salary from the New York Police Department, the Government was able to show that during 1970, notwithstanding his apparently modest means, King spent, by conservative estimate, in excess of \$20,000. A portion of this amount (approximately \$8,400) was attributable

⁵ Three weeks later, White met King again at the Howard Johnson's in Brentwood. At this meeting, King gave White two more paper bags. The bags contained money which King had received from two drug dealers in upper Manhattan. White kept his share of the money, which was \$300.00, and gave the rest to Matarasso (129-132).

to federal, state and local taxes, as well as to pension payments, charitable contributions, interest payments, automobile expenses and miscellaneous expenses (242, 409-411; GX. 43, 47, 83; GA. 8-9, 1-6, 10). Other expenses were of a different nature. In April of 1970, King informally separated from his first wife. Thereafter, through the end of the year, he made support payments to her totalling \$4,875.00 (344, 411). In addition, following the separation, King signed a lease for the rental of an apartment at 15 St. Andrews Place in Yonkers, New York, for which he paid a total of \$820.00 rent (64-66, 411; GX. 4; GA. 14-15). In order to furnish the apartment, King purchased \$6,585.09 worth of furniture from Brenner's Furniture Company in Yonkers. The furniture was acquired over a two month period from October to December of 1970 and was paid for entirely in cash (84-89).

Based on expenditures for 1970, it was established that during that year King had had adjusted gross income of not less than \$18,585.96, as opposed to the \$16,863 which he reported on his 1970 return, which he filed in 1971 (411-412; GX. 47, 83; GA. 1, 10). Moreover, the \$18,500 figure is a conservative estimate, for the amount is based on expenditure computations which did not take into account daily expenses for items such as food, clothing and entertainment (412-414).

II

King did not file a federal income tax return for 1971 (595-599). Nevertheless, the evidence showed that during the year he had total expenditures in excess of \$21,000 and adjusted gross income of \$20,631.83.⁶

⁶ As noted above, the charges in the indictment alleging failure to file in 1972 and attempted tax evasion in 1972 (Counts Two and Three) were dismissed after the jury returned a special verdict of no venue in the Eastern District of New York for that year.

During 1971, King had total withholding from his salary in the amount of \$4,155.06 for federal, state and local taxes and for pension payments (242, 379-~~7~~80, 399-400, 415-416; GX 43, 80, 83; GA. 8-9, 16, 11). He also had additional expenses. First, he deposited \$3,795.49 in his savings account at First National City Bank (392-393, 416; GX. 6, 83; GA. 17, 11). Second, in the first half of the year, he signed a lease for a studio apartment for his mother at 3424 Kingsbridge Avenue in the Bronx, for which he paid \$1,127.28 in rent (304-307, 416). At the same time, he continued to pay rent (\$2,460) on his own apartment in Yonkers (64-66, 416; GX. 4; GA. 14-15). Finally, he paid his first wife, Catherine, from whom he became officially separated in February of 1972 (400), \$6,500 in support money plus approximately \$3,200 for the purchase of an automobile (344, 416). For the year 1971, it was thus able to be determined that King spent a total of \$21,326.83 and that, based on this figure, he had adjusted gross income of \$20,031.83 and, after allowing for exemptions, taxable income of \$15,756.83 (416; GX. 83; GA. 11). As with 1970, the prosecution's computations did not include any money spent by King for daily living expenses and entertainment.⁷

⁷ As will be seen below, in addition to his defense of no venue in the Eastern District in 1972, King claimed that in fact he had mailed his 1971 return to the IRS but that it had been lost in the mail. (Oddly enough, New York City and New York State likewise never received King's returns for 1971 (587, 638), and the jury had ample basis for rejecting this defense). Thus, there was offered in evidence by the defense what was asserted to be a copy of the missing 1971 federal return (444-449).

At this point, what is worth noting about this document is that it states that in 1971 King had, in addition to his salary of \$18,081.13, income from gambling of \$14,500. When these two amounts are added together, the resulting total gross income of \$32,581.13 is considerably in excess of the \$20,000 figure put forth by the Government.

III

Although King was not charged with income tax evasion for the year 1972, the evidence clearly established that during that year his expenditures were at least equal to his reported earnings, if not in excess of them, and that he could not have accumulated any substantial cash horde in 1972 which would have been available to him in 1973. Moreover, the nature of the expenditures, in the form of cash, and the efforts to conceal some of these expenditures, provided evidence of a continuing pattern of conduct.

The year 1972 opened for King with a trip to Las Vegas, where he stayed at the Sands Hotel. During this trip did not use his true name. Instead, he sought to hide his identity by registering and gambling as "James Harris" (41-45, 277-281). King returned to the Sands again in July of 1972 and, once again, used the name "James Harris" (41-45, 296-298). On both occasions, he stayed in Las Vegas for about six days (44-45, 296-298). In addition to his trips to Las Vegas, King travelled to Puerto Rico, where he stayed with fellow detective Pasquale Intrieri at the El San Juan Hotel from April 3rd through April 10th (50-54). King's stays at the Sands and El San Juan, exclusive of travel, cost him a total of \$2,320 (41-45, 50-54).

During 1972, King resigned from the Police Department (380-382). He also paid \$12,000 in cash for a motorboat (70-77), \$360 for contributions, \$1,300 for miscellaneous expenses (211-213), \$5,200 for alimony and support payments to his former wife (344, 420), \$3,800 to Pasquale Intrieri for the purchase of an automobile (420), \$375 to Allstate Insurance Company and \$4,392.48 in combined rent for the apartments at 15 St. Andrew's Place in Yonkers and 3424 Kingsbridge Avenue in the Bronx (64-66, 420; GX. 4, 83; GA. 14-15, 12). During

1972, of course, King also incurred daily living expenses. In addition, there was the unknown cost of a trip to the Dominican Republic, where he obtained a divorce from his first wife, Catherine (116). Finally, including taxes and withholding, the Government computed total expenditures for King during 1972 of just over \$32,300 (GX. 83; GA. 12).

On the income tax return which he filed for the year 1972 in 1973, King declared a total gross income of approximately \$27,600. This consisted of \$7,632 earned as a detective before he left the Police Department and \$20,000 which he claimed he earned during the year as a freelance investigator (211-213).⁸

Significantly, in 1972, a year in which he was able to make substantial expenditures, King failed to either file his 1971 return or to send to the IRS the money which he owed for his 1971 taxes.⁹

IV

In 1974, King failed to file a 1973 income tax return. Nevertheless, the evidence showed that during 1973 he had total expenditures of \$131,740.19, adjusted gross income of \$93,275.93 and taxable income of \$82,016.42.

The largest single expense incurred by King during the year was the \$57,819 which he spent in connection with the purchase of a house in Chappaqua, New York.

⁸ In 1974, King admitted to his accountant that the statement on the 1972 return that he had income from freelance security work was false. Actually, King confided, he made the money from gambling (659-662, 677-679).

⁹ King argued that he did send in his 1971 return but that it got lost in the mail, footnote 7, *supra*. It is undisputed, however, that King did not pay his 1971 taxes until 1975 (448-449).

In the spring of 1973, King approached Anthony Gallo, the president of Tamarack Builders, Inc., and inquired about the house, which was located on one acre of land at 5 Old House Lane in Chappaqua (184-186). Gallo confirmed that the house was for sale, and King agreed to purchase the property for just over \$110,000 (186-188).

After settling on the purchase price, however, King told Gallo that he wished to make special arrangements for the completion of the transaction. Although he said that he was prepared to pay the full \$110,000 and to assume the \$55,000 mortgage on the property, King confided to Gallo that he wanted the mortgage and closing papers to reflect a purchase price of only \$80,000. The reason King gave for this request was that he did not want Ann King, who was then his fiance and whom he married in August of 1973 (116), to know the true cost of the house. Gallo agreed to the plan, and thus, during the period between April and July of 1973, King gave Gallo \$30,000 in cash, with the \$25,000 down payment on the house being paid by check (191-196, 424). During 1973, King incurred additional expenses on the property for escrow and mortgage payments and utilities in the amount of \$2,819.00 (213, 424). He also purchased \$12,595.50 worth of furniture for the house (56-60, 425).

During 1973, King had other substantial expenses. He first of all made mortgage principal payments in the amount of \$7,406.71 on property belonging to Ann King in Stony Point, New York (96, 104-108, 424, 466-467, 516-518). He also made a loan of \$13,100 to Robert King, the brother of Ann King (93-100, 308-310, 424, 469-470, 516-518) and paid a total of \$7,331.38 for rent on four separate premises: the apartment at 15 St. Andrew's Place in Yonkers; the apartment for his mother at 3424 Kingsbridge Avenue in the Bronx; and two more apartments, at 4601 Henry Hudson Parkway and 3777

Independence Avenue, both in the Bronx (64-66, 110-115, 256, 304-307, 424-425; GX 4, 83; GA. 14-15, 13).¹⁰ Finally, 1973 also saw King make investments in the amount of \$5,680.20 (424) and alimony and support payments to his former wife totalling \$6,500 (344, 425). The balance of King's expenses for 1973 were attributable to taxes and interest and insurance payments, deposits in saving accounts and various miscellaneous purchases (423-426, 465-467, 477-478, 516-518; GX. 83; GA. 13). Based on these expenses, and taking into account non-taxable receipts and appropriate deductions, the Government was able to establish that during 1973 King had adjusted gross income of \$93,275.93 and taxable income of \$82,016.42 (423-428; GX. 83; GA. 13).

The year 1973 ended for King, however, on an ominous note. In December, his neighbor Anthony Gallo, who had sold him the Chappaqua house, was visited by an investigator from the Office of New York's Special State Prosecutor. The investigator questioned Gallo about the sale of the Old House Lane property to King (199-200). Although pressed for the financial details of the transaction (200), Gallo failed to disclose the \$30,000 cash payment, telling the investigator instead that King had purchased the house for only \$80,000 (206). As soon as the investigator left, Gallo informed King of the interview (200-201).

Obviously realizing that he was being investigated for police corruption, King continued to try to conceal his income and to evade his taxes. Thus, in April of 1974,

¹⁰ In an application for a pistol permit which he filed in early 1973 and which was made under penalty of perjury, King, when asked to list his past residences, failed to give either his Commack or Yonkers addresses (238-239). Similarly, in a memorandum lease which he signed for the rental at 3777 Independence Avenue, King falsely stated that he had resided for two years at 3424 Kingsbridge Avenue (113).

he had three options available to him. He could file and declare all his income; he could file and not declare all his income; or, he could fail to file and wait and see what progress the investigators made and then file later and declare what income the State and any federal investigation revealed. King opted for this third tactic. Accordingly, on April 15, 1974, he filed for an extension of the time within which to file his 1973 return until June 15, 1974 (271; GX. 51; GA. 18-19). And, in making this application, he falsely stated under penalty of perjury that he had timely filed his federal income tax return for each of the three preceding years (GX. 51; GA. 18). Although King's request for a two month extension was granted, the 1973 return was not filed until the spring of 1975.

C. The Defense Case

The defendant himself did not testify. The sole witness called by him was Frederick Kahn, a certified public accountant. Kahn testified that he was retained by King in September of 1974 to prepare an allegedly second 1971 return and also a return for the year 1973, both of which were filed in 1975 (659-663, 680-681). Through Kahn, the defense sought to mainly establish that King had not resided in the Eastern District of New York in 1972 and that King had previously sent his 1971 return to the IRS but that it had gotten lost in the mail (663, 667-671). Kahn conceded, however, that with regard to the 1971 return being lost, he had relied on what King told him (663). Significantly, at no point in his testimony, did Kahn take issue with any of the expenditure and income computations put forth by the Government (659-691).¹¹

¹¹ As noted above, footnote 7, *supra*, Kahn also testified that King told him that income which he had reported on his 1972 return as coming from freelance investigative work was actually from gambling (678).

ARGUMENT

POINT I

The Testimony of Government Witness John White and Evidence of Expenditures by King Were Not Barred by the Doctrine of Collateral Estoppel and Were Properly Admitted in Evidence.

King argues that certain evidence which was admitted against him should have been barred by the doctrine of collateral estoppel. He points first to the testimony of John White concerning the two payoffs in the Howard Johnson's parking lot in the late fall of 1970. He also attacks the evidence of various expenditures made by him during the period covered by the indictment, in particular, proof of payments for the Chappaqua house, for furniture and for alimony and support.

The doctrine of collateral estoppel "operates, following a final judgment, to establish conclusively a matter of fact or law for the purposes of a later law suit on a different cause of action between the parties to the original action." *United States v. Kramer*, 289 F.2d 909, 913 (2d Cir. 1961), quoting Polasky, *Collateral Estoppel—Effects of Prior Litigation*, 39 Iowa L.Rev. 217, 218 (1954). In a criminal case, the defendant has the burden of establishing that the issue which he seeks to foreclose from litigation at the second trial was "necessarily" determined in his favor by the first verdict. *United States v. Cala*, 521 F.2d 605, 608 (2d Cir. 1975); *United States v. Tramunti*, 500 F.2d 1334, 1346 (2d Cir.), cert. denied, 419 U.S. 1079 (1974). And, since "it usually cannot be determined with any certainty upon what basis the previous jury reached its general verdict," *United States v. Gugliaro*, 501 F.2d 68, 70 (2d Cir. 1974), the burden of proof which is upon the defendant is "a heavy one." *United States v. Seijo*, 537 F.2d 694, 697

(2d Cir. 1976), *cert. denied*, — U.S. —, 97 S. Ct. 745 (1977).

In *United States v. Cala*, *supra*, Judge Mansfield described the kind of analysis which is to be followed by a court in deciding questions of collateral estoppel (521 F.2d at 608):

“In determining what issues were necessarily resolved by the prior proceedings, the court is to take a practical approach, examining the record, pleadings, evidence and jury instructions in order to decide ‘whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.’ If the jury could have done so in the prior case, the claim of collateral estoppel must fail, since the defendant can prevail only if the issue which he seeks to preclude from consideration was ‘necessarily’ resolved in his favor in the prior proceeding.” (citations omitted).

We submit that application of the *Cala* analysis to the facts of this case compels the conclusion that King has failed to meet his burden of establishing that the White testimony and the expenditures proof should have been barred by collateral estoppel.

King bases his collateral estoppel claim on the fact that in the spring of 1976 he was tried and acquitted in the Eastern District, before Judge Weinstein, on a two count indictment (75 CR 973) which charged him with civil rights conspiracy and illegal wiretapping. Specifically, it was alleged in Count One of the indictment that King and his three co-defendants, Detectives Ann King, Ronald Heffernan and Jack Matarasso, conspired, during the period from 1969 to 1971, to use their authority as police officers to deprive United States citizens of their constitutional rights by subjecting them to illegal electronic surveillance and by extorting money from them, in viola-

tion of 18 U.S.C. § 241. Count Two charged that between July 21st and August 19th, 1971, the four defendants placed an illegal wiretap on a telephone located at 130-01 226th Street, Queens, New York (GA. 20-24).¹²

The conspiracy trial lasted approximately eight weeks. The thrust of the Government's case was that during the period covered by the indictment, King, his co-defendants and other corrupt police officers, the SIU engaged in a course of conduct in which they would shakedown narcotics dealers and extort money from them. Illegal wiretaps, as well as lawful wiretaps obtained through the filing of false affidavits, were used by the detectives to monitor the activities of their extortion victims. The prosecution presented its case chiefly through the testimony of former narcotics dealers and ex-members of the SIU who had also been involved in the corruption. These witnesses testified to no less than fifteen separate episodes of police corruption and illegal activity involving King and his associates (B. 6402-6416, 6424-6426, 6428-6434, 6447-6449, 6459, 6501-6515, 6521-6523, 6526, 6529-6539, 6544, 6547-6551, 6560-6563, 6567-6570, 6582, 6590).¹³

¹² King was tried with Heffernan and Matarasso. The case against Ann King was severed because of her ill health.

¹³ We are having included in the record on appeal portions of the transcript from the 1976 trial (the first trial, the civil rights conspiracy case). References preceded by the letter "B" are to pages of the transcript of the 1976 trial.

The pages of the 1976 trial which are being transmitted to the Court are 516-664 and 6384-7256. These portions of the transcript contain the opening statements of the prosecution and defense (516-562), the summations for both sides (6390-7168) and the judge's charge and jury deliberations (7171-7253). We believe that these portions of the transcript, in particular the prosecutor's summation (6384-6601), provide a fair and complete summary of the evidence presented at the 1976 trial. Thus, the Court should be able to assess King's collateral estoppel claim without having to wade through a 7,000 page record.

At the civil rights conspiracy trial, John White testified for the Government, as he did in the tax case, concerning the "Chinaman" investigation and his receipt of money from Frank King in the Howard Johnson's parking lot (B. 6569-6571). In addition, to show an increase in wealth, the prosecution offered in evidence proof of King's expenditures for furniture, for alimony and support and for the Chappaqua property (B. 6568, 6586, 6595, 7157).

Prior to the tax trial, King moved to have the White testimony and the expenditures proof barred on the grounds of collateral estoppel. After receiving papers and hearing argument, Judge Weinstein, who had presided at the first trial and who was familiar with the record in the case, denied the motion (Transcript of proceedings of December 21, 1976).

An examination of the record makes it clear that Judge Weinstein correctly denied the motion and that King has totally failed to meet his heavy burden of establishing that the matters which he sought to foreclose from litigation at the tax trial were "*necessarily*" decided in his favor in the civil rights case.

To begin with, the issues in the two trials were completely different. The jury in the first trial had to determine whether or not the prosecution had proved beyond a reasonable doubt that King had been a member of long-term conspiracy to deprive individuals of their civil rights by extorting money from them and by conducting illegal wiretapping. In the second case, the issue was tax evasion. Thus, while the question in 1976 was whether or not King had extorted money, the issue before the jury in the tax trial was not how he had gotten money but whether or not he had tried to evade the payment of taxes on that money.

Turning to the two types of evidence which King says should have been excluded from the tax trial, it is clear, first of all, that with respect to expenditures, there never

was an issue at the first trial. It was not disputed, as, indeed, it was not at the tax trial, that the expenditures took place; rather, what was at issue was the source of the money which was used for those expenditures (B. 6447-6949). Thus, since there never has been any dispute as to the fact of the expenditures, King can hardly argue that the jury in the first case determined that the expenditures were not made.

The testimony of John White also presents no problem, since there are various rational bases upon which a jury could have found White credible and still have acquitted King in the first trial.

Firstly, King was charged with being a member of a specified conspiracy among members of the SIU, the purpose of which (to the extent relevant here) was to violate the civil rights of citizens by depriving them of money or property without due process of law. A rational jury could well have found that although King committed the various corrupt acts proven (including sharing money with White), his actions were not part of an overall conspiracy within the SIU to deprive citizens of property without due process of law as charged in the indictment, but rather were a spontaneous series of shakedowns or a series of separate smaller conspiracies in which King participated with different independent groups of police officers when a situation presented itself.

Second, a rational jury could well have found that although King committed the acts testified to by White as part of a single conspiracy with other members of the SIU, these acts (the taking of money and sharing of money), were part of a conspiracy to violate State rather than federal law. In fact, the court instructed the jury to consider this possibility (B. 7199):

"Now, with respect to Count I, even if you were to find that a defendant acted wrongfully in viola-

tion of state law, the laws such as theft or robbery or bribe receiving, you may not convict him unless you find beyond a reasonable doubt that his conduct violated federal statutes as I have explained them to you."

The distinct possibility that a jury could have believed White when he testified concerning the receipt of monies by King and rejected the theory that these acts were part of a conspiracy to violate the civil rights of citizens is underscored by another portion of the court's charge (B. 7210):

"If you believe that a witness has falsely sworn to you with respect to a material element of the case, you may disregard his or her testimony in whole, but you don't have to, you can accept part of it because the witness may have been mistaken about part, or deliberately lied about a part and been accurate about other parts and you have to put it all together into a single framework that makes sense."

It is also clear that the jury in the civil rights trial could well have accepted all of the testimony of White and acquitted King because it found that the prosecution was barred by the statute of limitations. This argument was made to the jury by counsel for King in his summation (B. 6801, 6977-6978). In addition, the court gave the following instructions on this critical point of law:

"Now there is a statute ~~of~~ limitations problem in this case, and I will tell you about the statute of limitations as it applies later in the charge." (B. 7197, emphasis supplied).

* * * * *

"Now, with that in mind to find a defendant guilty under Count 1 it is necessary that the Government prove beyond a reasonable doubt that at least one of the overt acts in furtherance of the conspiracy

was performed while the conspiracy was still in existence, while the particular defendant involved was a member of the conspiracy within five years preceding the indictment. The indictment was handed down on December 22, 1975, and therefore you must find that the conspiracy continued after December 22, 1970 and that at least one overt act charged was committed at least after December 22, 1970. The indictment charges that the conspiracy existed during the period from the beginning of 1969 through the end of 1971. The overt acts alleged to have occurred after December 1970 are two illegal wiretaps, one on Salvatore Larca and another on Alfio Indiviglia, and the execution of two false affidavits to obtain wiretap authorization, one executed by the defendant Frank King for a tap on Eugene Garner and another by defendant Heffernan for a tap on Augustus Owens. You must find that at least one of those four overt acts must have occurred after December 1970." (7206-7207).

There is some evidence that the jury carefully considered the statute of limitations "problem" in the case and may well have acquitted King (and the others) on this basis, since the jury notes received during the deliberations substantially dealt with overt acts after December 1970 (B. 7228-7253).

In short, King has failed to meet his burden of showing that the challenged issues (the White testimony and proof of certain expenditures) were "*necessarily*" decided in his favor at the first trial. His collateral estoppel claim thus fails.

POINT II

The Evidence Against King Was More Than Sufficient to Convict.

A. Introduction

Notwithstanding the overwhelming proof of guilt, King argues, on various grounds, that with respect to each of the four counts of the indictment on which he was found guilty, there was insufficient evidence to convict. We disagree. Indeed, viewing the evidence in the light most favorable to the Government, *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Marra-pese*, 486 F.2d 918, 921 (2d Cir. 1973), *cert. denied*, 415 U.S. 994 (1974), it is clear that there was more than sufficient evidence on the basis of which a reasonable juror could have found King guilty. *United States v. Rivera*, 513 F.2d 519, 528-530 (2d Cir.), *cert. denied*, 423 U.S. 948 (1975); *United States v. Freeman*, 498 F.2d 569, 571 (2d Cir. 1974); *United States v. Taylor*, 464 F.2d 240, 243-245 (2d Cir. 1972).

As detailed in the Statement of Facts, *supra*, the evidence at trial showed that during the period from 1970 through 1974 King attempted to evade the payment of his federal income taxes. He sought to do so by providing false information on his 1970 return and on the application for an extension of the time within which to file his 1973 return. In addition, he deliberately failed to file his 1971 and 1973 returns, and throughout the period he sought to conceal substantial portions of his income. We believe that our Statement of Facts is a complete answer to any *general* insufficiency claim which could be raised in this case. Thus, in this portion of the brief, we will simply respond to the specific sufficiency arguments which King makes with respect to each count.

B. Count One

Count One of the indictment alleged that when King signed his 1970 income tax return, he knew it to contain a false statement as to a material matter, in violation of 26 U.S.C. § 7206(1). Specifically, it was charged that King substantially understated his adjusted gross income when he reported a figure of \$16,863 (A. 6-7). The evidence at trial showed that, as computed by the expenditures method, he actually had adjusted gross income well in excess of \$18,500 (GX. 83; GA. 10).

On appeal, King argues that the difference between adjusted gross income as reported on his return and as computed by the prosecution was not material within the meaning of § 7206(1). He also contends that there were errors in the Government's figures with regard to certain expenditures for the year 1970, so as to render incorrect the computations for total expenditures and adjusted gross income.

Section 7206(1) makes it an offense for anyone to wilfully make and subscribe

“ . . . any return, statement or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury and which he does not believe to be true and correct as to every material matter . . . ”

Under this section, the test for materiality is whether the particular item must be reported “in order that the taxpayer estimate and compute his tax correctly.” *United States v. Rayor*, 204 F. Supp. 486, 491 (S.D. Cal. 1962). See also, *United States v. Warden*, 545 F.2d 32, 37 (7th Cir. 1976); *United States v. Null*, 415 F.2d 1178, 1181 (4th Cir. 1969). Adjusted gross income, the factor in question here, constitutes the basis of an individual's tax liability. It is *the* item which must be reported in order

that a taxpayer may "estimate and compute his tax correctly." Thus, it can hardly be argued that adjusted gross income is not "material" for purposes of § 7206(1).

Under Count One, the prosecution did not have to prove the precise amount by which King understated his adjusted gross income. The Government simply had to show that the figure was understated by a substantial amount. *United States v. Marcus*, 401 F.2d 563, 565 (2d Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969). Based on the computed expenditures, it was established that King had understated his adjusted gross income by not less than \$1,700. This, in itself, was certainly, in this case, a substantial amount. Moreover, since the Government's expenditure computations did not include daily living expenses such as food, entertainment and clothing, the jury was entitled to conclude that King's adjusted gross income was actually well in excess of the \$18,500 proved at trial.

As noted above, King also alleges error in some of the expense figures computed by the Government for 1970. The short answer here, of course, is that this was a matter for the jury to decide and that these points were resolved in the Government's favor. Even if King's complaints are examined, however, they are revealed to be frivolous.

His first claim is that when it computed his 1970 expenditures, the Government counted twice certain payments for sales taxes. He bases the argument on the fact that the \$6,585.09 spent on furniture for the Yonkers apartment represented both the retail price for the furniture and the related sales taxes (GX. 83; GA. 10). As shown above, in addition to the payments to Brenner's Furniture, the Government also included separately as an expense for 1970 amounts spent by King on gasoline, real estate and sales taxes (\$1,542) (GX. 83; GA. 10).

The information for these expenses was obtained from King's return, where, among other things, he claimed a deduction of \$166 for sales taxes (GX. 47, 83; GA. 3, 10). Based on all of this, King makes the bald assertion that the prosecution computed twice the \$166 he claimed on his return as a deduction. As already noted, this is an argument which should have been made to the jury. Moreover, the claim is based wholly on speculation, for there is no evidence in the record from which it could be concluded that the \$166 included in the category of general sales taxes was also part of the sales taxes included in computing the payments to Brenner's.

King also claims that there was insufficient evidence to support the Government's contention that during 1970 he spent \$820 on the rental of the apartment at 15 St. Andrew's Place in Yonkers. The argument is without merit. The \$820 figure was based on the lease, which was admitted in evidence (GX. 4; GA. 14-15) and the testimony of the rental agent (63-69). The monthly rent was \$205, payable monthly. King was in the apartment during the months of October, November and December in 1970, and he put down a security deposit of one month's rent (GX. 4; GA. 14-15). Thus, during 1970, King paid, as the Government contended, a total of \$820 with respect to the Yonkers apartment. Contrary to King's assertion, there is evidence in the record concerning payments of rent. The lease bears a notation to the effect that when King moved out of the apartment in 1973, he only owed one month's rent (GX. 4; GA. 15). The jury could thus have reasonably inferred that the 1970 rental payments were timely made.

Another item computed by the Government as an expense for 1970 was \$1,440 in automobile expenditures. This figure was obtained from King's 1970 return, where he claimed this amount as a deduction for business ex-

penses (GX. 47, 83; GA. 1, 10). Now, on appeal, King argues that portions of this figure, in particular, gas taxes, were computed twice by the Government. The claim is frivolous. In an attachment to his 1970 return, King specifically stated that the \$1,440 which he was claiming was based on the fact that 12,000 of the 30,000 miles put on his car in 1970 were for Police Department business (GX. 47; GA. 6). The \$.12 per mile rate used in arriving at the \$1,440 figure included not only expenses for gasoline, but also repairs and insurance costs (438-439). Neither of these latter two items was computed separately in the Government's figures for 1970 expenditures (GX. 83; GA. 10), and the only place anything relating to gasoline expenses was counted was under taxes, where there was included \$92 spent on gas taxes (GX. 47, 83; GA. 3, 10). The \$1,440 figure was properly before the jury.

Finally, King argues that the prosecution erred in asserting that in 1970 he paid alimony and support payments totalling \$4,875, based on 39 weekly payments of \$125 each. He contends that the evidence does not support the Government's position that his first wife began receiving alimony as of April 1, 1970. Once again, as with all these matters, this was a question for the jury to decide. While it is true, as King suggests, that the jury "could" have concluded that the payments began in the middle of April, thus reducing the total amount paid by \$250, it was just as reasonable for the jury to conclude otherwise (342-344). King cannot now be heard to complain.

C. Count Four

On Count Four of the indictment, King was convicted of knowingly and wilfully failing to timely file his 1973 federal income tax return, in violation of 26 U.S.C. § 7203. On appeal, he contends that the evidence ad-

duced at trial was insufficient to establish an offense under the failure to file statute. Specifically, he argues that in light of the fact that he was granted an extension to June 15, 1974 of the time within which to file his return, the evidence at trial failed to prove beyond a reasonable doubt a wilfull failure to file. The claim is without merit.

Section 7203 makes it a misdemeanor for any person required by law to file an income tax return to "wilfully [fail] to . . . make such return . . . at the time or times required . . ." In order to sustain a conviction for wilfull failure to file, the prosecution must establish three things: *first*, that the defendant was a person required by law to file a return; *second*, that he failed to file the return at the time required by law; and *third*, that the failure to file was wilfull. *United States v. Borque*, 541 F.2d 290, 293 (1st Cir. 1976); *United States v. Matosky*, 421 F.2d 410, 413 (7th Cir.), *cert. denied*, 398 U.S. 904 (1970); *United States v. McCormick*, 67 F.2d 867, 868 (2d Cir. 1933), *cert. denied*, 291 U.S. 662 (1934).

In this case, it is clear that the prosecution met its burden of proof with respect to each of the required elements. First, it is undisputed that by virtue of his income in 1973 King was required to file a tax return. Second, it is uncontested that King failed to file his return when it was due, specifically, on or before June 15, 1974, as per the terms of the extension which he was granted (GX. 51; GA. 18). Indeed, the return was not filed until the spring of 1975, almost nine months later. Finally, there was more than sufficient evidence from which the jury could have concluded that King's failure to file was wilfull. Thus, not only did the jury have before it King's pattern of behavior during the 1970-1974 period of seeking to conceal income, as outlined in the Statement of Facts. It also could con-

sider King's prior failure to file in 1972, as well as the fact that when June 15, 1974 arrived, King did not apply for another extension, but simply let the date pass without filing.¹⁴

D. Count Five

In Count Five of the indictment, King was charged with attempting to evade the payment of his 1973 federal income taxes by failing to file his 1973 return, by failing to pay the tax which was due and by concealing and attempting to conceal his income, in violation of 26 U.S.C. § 7201. Under this count, the Government had the burden of establishing that King took some affirmative action in seeking to evade the payment of his taxes, over and above the failure to file. *Spies v. United States*, *supra*, 317 U.S. at 498. On appeal, King argues that this burden was not met. He contends that the prosecution failed to prove the required affirmative act in the attempted evasion. We disagree.

In *Spies*, the Supreme Court stated that an affirmative attempt at evasion could be inferred from, among other things,

"concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and

¹⁴ The jury obviously did not accept King's defense that because of his wife's illness the failure to file was not wilful.

Also to be rejected is the contention that because the IRS failed to assert any civil penalties criminal prosecution was barred. In *Spies v. United States*, 317 U.S. 492, 495 (1943), the Supreme Court pointed out that "[t]he penalties imposed by Congress to enforce the tax laws embrace both civil and criminal sanctions. . . . Invocation of one does not exclude resort to the other." A fortiori, the fact that civil remedies are not pursued does not mean that criminal charges cannot be brought.

any conduct, the likely effect of which would be to mislead or conceal. If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime." 317 U.S. at 499.

In this case, as the Statement of Facts amply demonstrates, King engaged in a continuing pattern of concealment of income throughout the entire period from 1970 through 1974 (for example, cash payments, use of false identity and false statements on the 1972 return as to source of income). Thus, it can hardly be argued, as King does, that no affirmative action towards evasion was taken with regard to 1973 taxes. Most importantly, there was King's secret \$30,000 cash payment to Anthony Gallo in connection with the purchase of the Chappaqua house, combined with the falsification of the closing and financing papers so as to show a price of \$80,000 as opposed to the true cost of \$110,000. The jury was also entitled to infer that King's application for an extension of the time within which to file his 1973 return, where he falsely stated that he had timely filed in each of the three previous years, was an affirmative act of concealment. Cf. *United States v. Mollet*, 290 F.2d 273 (2d Cir. 1961).

E. Count Six

On Count Six, King was convicted of violating 26 U.S.C. § 7206(1) for falsely stating, in his application for an extension of the time within which to file his 1973 return, that he had timely filed in each of the three immediately preceding years. As already seen, King failed to file his 1971 return until 1975. King now argues that his false statement in the extension application was not material within the meaning of § 7206(1).

The materiality requirement of § 7206(1) has already been discussed at some length in Part B of this Point. Here, it is enough to note that in addition to finding a matter material which must be reported "in order that the taxpayer estimate and compute his tax correctly," *United States v. Rayor*, *supra*, 204 F. Supp. at 491, the courts have found materiality where a matter would have a tendency to influence the IRS in its processing of tax returns. *United States v. DiVarco*, 843 F. Supp. 101, 103-104 (E.D. Ill. 1972), *aff'd*, 484 F.2d 670 (7th Cir. 1973), *cert. denied*, 415 U.S. 916 (1974). Thus, in *United States v. DiVarco*, the court held that the source of a person's income, as stated on the federal income tax return, is a material matter within the meaning of § 7206(1).

Here, in the case of an application for an extension of the time within which to file, the question with respect to previous filings was clearly material. It goes without saying that the timely filing of returns and payment of taxes is a matter of importance to the IRS. Thus, when a taxpayer requests an extension of time, it is essential that the IRS know the reasons for the request and be satisfied that the request is being made in good faith. Information concerning past filings is important so that the IRS can evaluate an extension application in light of the taxpayer's record. Information concerning the failure to file in the past would also be important because of its relevance in alerting the Government as to any penalties which might be due. Finally, and most simply, when a taxpayer requests an extension, the IRS, at the very least, is entitled to know whether or not he has filed in the past. King's argument is without merit.

POINT III

King Waived Any Objection to Venue in the Eastern District Under Count One, and Venue in the Eastern District Under Count One Was Proper.

King argues that the Government failed to establish venue in the Eastern District under Count One. He contends that the evidence showed that during the period in question he resided in Yonkers and that he filed his 1970 return in Andover, Massachusetts. We disagree. Not only has King waived any objection to venue under Count One, but there is no merit to his claim anyway.

In *United States v. Price*, 447 F.2d 23, 27 (2d Cir.), cert. denied, 404 U.S. 912 (1971), this Court set forth the two situations where a finding of a waiver of venue is proper:

“(a) when the indictment or statements by the prosecution clearly reveal this defect but the defendant fails to object; and (b) when, after the government has concluded its case, the defendant specifies grounds for acquittal but is silent as to venue.”

Prior to trial, though afforded complete discovery, King made no objection to venue in the Eastern District under Count One, although he did attack venue on Counts Two through Six. After the commencement of the trial, King narrowed the focus of his venue challenge to Counts Two and Three, but still failed to attack Count One. And indeed, when asked by Judge Weinstein if he was contesting venue under Count One, King's attorney specifically stated that he was not (377), and no further mention was made of the point. Thus, neither before, during nor after trial has King ever challenged venue under

Count One. He cannot now be heard to complain for the first time on appeal.

Waiver aside, however, it is clear that venue was proper in the Eastern District under Count One. To begin with, at all relevant times, King's first wife, who also signed the 1970 return, resided in the Eastern District. Moreover, contrary to the assertions on appeal, there was abundant evidence that during the relevant portions of the 1970-1971 period King was a resident of Commack in the Eastern District. Even after King separated from his wife in April of 1970, he returned and stayed at the house periodically when visiting his children (344-345). In addition, the 1971-1972 Commack telephone directory listed King (397), and Police Department personnel files carried King as a resident of Commack until June of 1971 (390). Moreover, and most importantly, on his 1970 return, King gave Commack as his place of residence and when listing a return address on the envelope in which he enclosed the return, he wrote (GX. 47; GA. 7).

"F. King
15 Split Rail Place
Commack, N.Y. 11725."

It is settled that under § 7206(1) venue properly lies where the false statement is prepared and signed. *United States v. Slutsky*, 487 F.2d 832, 838-839 (2d Cir. 1973), *cert. denied*, 416 U.S. 937, *reh. denied*, 416 U.S. 1000 (1974). Here, the jury could properly conclude that King prepared and signed the return where both he and his wife resided in the Eastern District, particularly in view of the fact that the return and its envelope bore a Commack address and since there was no evidence to the contrary.

POINT IV

King Has Failed to Establish that He Was the Victim of Selective Prosecution.

Prior to trial, King moved to dismiss the indictment on grounds of selective prosecution. The motion was denied by Judge Weinstein (See Transcript of proceedings of December 21, 1976). On appeal, he urges the claim again. In *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974), this Court set the following standard for determining whether a defense of selective prosecution will lie:

"To support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at least *prima facie*, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. These two essential elements are sometimes referred to as 'intentional and purposeful discrimination.'" [citations omitted].

Since King has made no efforts to satisfy the above requirements, his argument must fail.¹⁵

¹⁵ King concludes his brief on a cryptic note.

"It is apparent that illegal wire tap evidence was used with regard to obtaining leads for this investigation. It should be noted that a hearing will be held with regard

[Footnote continued on following page]

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
July 27, 1977

Respectfully submitted,

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thereto. This appeal reserves the right to raise the issue at a subsequent time." (Brief, at page 10).

We simply note in passing that there is nothing in the record in this case to either justify King's bald allegation or to require a hearing. Cf. *United States v. Van Orsdell*, 521 F.2d 1323 (2d Cir. 1975), *cert. denied*, 423 U.S. 1059 (1976). To date, no such hearing has been ordered.

* The United States Attorney's Office wishes to acknowledge the assistance of Mr. Raymond E. Kramer in the preparation of this brief. Mr. Kramer is a third year student at the Harvard Law School.



AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Dolores Byrd being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 2nd day of August 19⁷⁷ he served a copy of the within
Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Murray Appleman, Esq.

Francis E. King

225 Broadway

177 White Plains Road

New York, N.Y. 10007

Tarrytown, N.Y. 10591

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County of Kings, City of New York.

Sworn to before me this

2nd day of ~~July~~ August 19⁷⁷

Barbara A. Allen
BARBARA A. ALLEN
Notary Public in and for New York
No. 24-110004
Qualified in Kings County
Commission Expires March 30, 1979

